***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-4218

# United States Court of Appeals

For the Second Circuit

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*—against—*

MILK DRIVERS & DAIRY EMPLOYEES, LOCAL 338, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Respondent.*

On Application for Enforcement of an Order of
The National Labor Relations Board

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P/S

## RESPONDENT'S BRIEF

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MILK DRIVERS & DAIRY EMPLOYEES, LOCAL 338,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

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On Application for Enforcement of an Order of
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## RESPONDENT'S BRIEF

## ISSUES PRESENTED FOR REVIEW

1. Does the National Labor Relations Act require that longevity of employment be the only basis under a collective bargaining agreement for establishing the seniority of employees?

2. Does a collective bargaining agreement inherently violate the Act because it recognizes service

to the bargaining unit as a steward for seniority purposes?

3. Does a union violate Section 8(b)(1)(A) and (2) of the Act by maintaining and enforcing such an agreement for stewards seniority where (1) appointment as a steward is not dependent upon union membership or participation in union activities, and (2) there is no evidence that the making or enforcement of such agreement was motivated for the purpose of or had the effect of encouraging or discouraging union membership or participation in union activities?

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

This is an application by the National Labor Relations Board (the "Board") to enforce against Milk Drivers & Dairy Employees, Local 338, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 338"), its order issued on July 29, 1975. The Board's decision and order are reported at 219 NLRB No. 107 and are reproduced at A. 68-94.*

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*Numerical citations preceded by the letter "A" refer to pages of the appendix.

## II. PROCEEDINGS AND DISPOSITION BELOW

The parties waived decision by the Administrative Law Judge and submitted the case to the Board upon stipulated facts (A. 68-69).

A majority of the Board found that Local 338 violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the "Act") by maintaining and enforcing collective bargaining agreements under which the steward appointed by Local 338 from among employees covered by the agreements was considered the senior employee in his craft. The majority also found that Local 338 violated Section 8(b)(1)(A) and (2) by maintaining and enforcing such an agreement to the extent that it permitted the steward at Dairylea Cooperative Inc. ("Dairylea") in Nanuet, New York to exercise his steward's seniority in bidding for an open milk drivers route.

These findings were made in the absence of any evidence that the stewards provision was motivated for the purpose of encouraging or discouraging union membership or activity, that the appointment of the steward at Nanuet was motivated by such purpose or that the open route at Nanuet was awarded for such purpose.

The majority assumed that stewards were selected because of their "... ability to perform the job effectively" (A. 73). It nevertheless concluded, in the absence of any evidence to such effect, that there exists

> "... an inherent tendency of super seniority clauses to discriminate against employees for union-related reasons, and thereby to restrain and coerce employees with respect to the exercise of their rights protected by Section 7 of the Act...." (A. 74)

Member Fanning dissented and would have dismissed the complaint (A. 88). He pointed out that,

> "The only basis for finding the agreement and its application unlawful is the factually unsupported conclusion that the agreement marginally encourages union membership or support." (A. 84)

Member Fanning concluded that,

> "As there is no evidence of any discrimination in the selection of stewards, and no basis for concluding that measuring seniority, in the first instance, by service to the unit as steward violates the Act as a matter of law - precedent and logic both pointing in quite the opposite direction - there is a clear failure of proof of any violation of the Act." (A. 88)

## STATEMENT OF FACTS

### I. ADOPTION OF THE STEWARDS PROVISION

Local 338 first negotiated collective bargaining agreements in or about 1937 (A. 64). It did not negotiate on an individual union basis at that time. It became the fifth union participant in industry-wide negotiations which had previously been established by four other unions and by employers in the Northern New Jersey and New York City Metropolitan Area dairy industry (Ibid.).

The unions and employers who participated in these joint negotiations had, before Local 338's arrival on the scene, negotiated contracts under which a steward selected by the union from among the employees at an employer's facility was considered the senior employee in his craft (A. 31, 64). As a new participant in the joint negotiations, Local 338 adopted without discussion the form of industry contract previously arrived at, which included this stewards provision (A. 64).

There is no evidence as to Local 338's motive in agreeing to the stewards provision except as described above (A. 65-66). The Board held, nevertheless, that Local 338 violated Section 8(b)(1)(A) and (2) of the Act by maintaining and enforcing the stewards provision (A. 79)

because "... of the inherent tendency of super seniority clauses to discriminate against employees for union-related reasons...." (A. 74).

## II. THE STATUTE AND THE CONTRACT COMPARED

It is an unfair labor practice under Section 8(b)(1)(A) of the Act for a union

> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7...."

Section 7 provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

It is an unfair labor practice under Section 8(b)(2) for a union

> "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)...."

It is an unfair labor practice under Section 8(a)(3) for an employer

> "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...."

There is nothing in the stewards provision which contravenes the language of the statute. It is not addressed to self-organization or to any other concerted activity covered by Section 7. Becoming a steward is not conditioned upon becoming or remaining a union member. The only condition is that he

> "... shall be an employee of the place in which he is a Steward." (A. 31).

The full text of the provision is reproduced below.

> "9.(a) There shall be a Steward or Stewards, but not more than one for each craft per shift, at every Delivery Branch, Pasteurizing Plant, and Garage to see whether the members of the Union and the Employer live up to the provisions of this agreement and the rules of the Union, not inconsistent with this agreement, and to report any

> infraction of such provisions and rules to the Superintendent who shall promptly correct them. Such Steward or Stewards shall be selected by the Union and each shall be an employee of the place in which he is Steward. There shall be no discrimination against Stewards for Union activities. The Steward shall have no authority to alter, amend, violate or otherwise change any part of this agreement. The Steward shall report to the Business Agent of the Union any violations of this agreement.
>
> (b) The Steward shall be considered the Senior employee in the craft in which he is employed, and if there is more than one Steward, seniority, as between the Stewards shall be based on their Company seniority. The Superintendent or Branch Manager shall recognize the Steward as a representative of the Union locally, and shall inform him, prior to the laying off of employees, and of all union personnel changes. The Shop Steward shall bring to the attention of the Employer's representative, as provided in paragraph 9(d) hereof any hardship on any employee. The Employer shall entertain no complaint involving an alleged breach of any provision of this agreement until the complaining party has given a written statement of such complaint to the Steward or delegate." (A. 31-32) (emphasis added).

The Board found that this provision tends to discriminate among employees for union related reasons. There is nothing in the text of the provision to support this conclusion.

## III. EVENTS SUBSEQUENT TO ADOPTION OF THE STEWARDS PROVISION

Local 338 continued to participate in the previously described joint negotiations until it withdrew from them in 1960 (A. 64). Upon its withdrawal from those negotiations, it and the employers with which it bargained continued to include the stewards provision in their contracts (A. 64, 65). No proposals were ever made to eliminate or modify the stewards provision nor were they ever discussed during negotiations. (Ibid.).

Local 338 and Dairylea were parties to the standard form of industry agreement which was effective November 30, 1971 to November 30, 1973 (A. 22) for Dairylea's facility in Nanuet (A. 5-7, 15). This agreement was admitted into evidence as Exhibit GC 3 (A. 22). It contained the stewards provision (A. 30-31).

Howard Rosengrandt was appointed steward at Nanuet on December 13, 1972, during the term of GC 3 (A. 24). On December 27, 1972, a milk drivers route became open for bid at Nanuet, and employees submitted bids for the route pursuant to GC 3 (A. 24). Peter Daniels and Rosengrandt were among the bidders (Ibid.). Daniels had the greatest longevity of service (A. 43). The

route was awarded to Rosengrandt rather than Daniels because under the stewards provision, he was the senior employee (A. 25).

The Board found that Local 338 violated Section 8(b)(1)(A) and (2) by maintaining and enforcing GC 3 so as to discriminate against Daniels and in favor of Rosengrandt with respect to the award of the open route (A. 79-80).

There was no evidence that the award of the route to Rosengrandt was motivated by considerations of union membership or union activity or that Rosengrandt's appointment as steward was motivated by such considerations. The bids were submitted and the route was awarded pursuant to the contract in effect at Nanuet. It was assumed that Rosengrandt was appointed because of his ability to be an effective steward. The Board stated:

> "If we have made an unstated assumption it is that the Union will select persons for steward who have the ability to perform the job effectively." (A. 72-73)

The circumstances leading up to the events at Nanuet are set forth in the Record as follows.

Local 338 and Dairylea have since prior to 1944 been parties to contracts covering various Dairylea facilities and containing the stewards provision (A. 26). Beginning in 1956 Local 338 maintained contracts with Bauman Dairy which then owned the Nanuet facility, and the contracts with Bauman also contained the stewards provision (Ibid.). Inclusion of the stewards provisions in the Dairylea and Bauman contracts was thus the result of the joint industry-wide negotiations which Local 338 entered in 1937 and continued to participate in until 1960 (pages 5, 9, supra).

Dairylea obtained the Nanuet facility from Bauman subject to the then existing contract with Local 338 and thereafter maintained contracts with Local 338 which covered Nanuet and which contained the stewards provision (Ibid.).

Daniels had been employed by Edwin C. Harrig Dairy in West Nyack, New York prior to his employment at Nanuet (Ibid.). He had been covered at Harrig Dairy by Local 338 contracts which also contained the stewards provision (Ibid.). The contracts between Local 338 and Harrig Dairy date back to 1947, that is, to the period of the joint industry-wide negotiations (Ibid.). The seniority dates accorded employees at Nanuet included

their prior service with other employers in the industry (A. 23-24), which for Daniels included his service with Harrig Dairy.

The 1971-1973 Nanuet contract here in issue (GC 3) was submitted to a ratification vote and was duly ratified (A. 25-26). Prior to its negotiation, Local 338 requested proposals for negotiations (A. 29). Various employees, including employees at Nanuet, submitted proposals (Ibid.), but there were none for the elimination or modification of the stewards provision (A. 29-30). No such proposals were ever made during the entire history of Local 338's collective bargaining (A. 65).

David Hopper preceded Rosengrandt as steward at Nanuet (A. 65). When Hopper resigned, he recommended that Rosengrandt succeed him (Ibid.). Rosengrandt had previously substituted for Hopper as steward when Hopper was ill (Ibid.). Rosengrandt was appointed steward solely on the basis of Hopper's recommendation (Ibid.).

The above facts are undisputed. There is not one iota of evidence that Rosengrandt was favored over Daniels by reason of union membership or union activities. The Board found nevertheless that Local 338 had violated Section 8(b)(1)(A) and (2) by maintaining and enforcing GC 3 insofar as it resulted in an open route being awarded

to Rosengrandt.

There is no evidence, nor did the Board suggest, that the stewards provision was ever used to discriminate between employees because of union membership or union activities or that it ever had the effect of encouraging or discouarging union membership or participation in union activities.

## SUMMARY OF ARGUMENT

It is the position of Local 338 that:

1. It was error for the Board to conclude that the stewards provision inherently discriminates against employees for union related reasons;

2. In any event, the stewards provision does not have the foreseeable consequence of encouraging or discouraging union membership or activities; and

3. Maintenance and enforcement of the stewards provision is justified.

These contentions will be discussed in the above order.

## ARGUMENT

### POINT I

### IT WAS ERROR FOR THE BOARD TO CONCLUDE THAT THE STEWARDS PROVISION INHERENTLY DISCRIMINATES AGAINST EMPLOYEES FOR UNION RELATED REASONS.

The majority and dissenting opinions focus on the critical issues of (1) whether the Board correctly concluded that the stewards provision inherently discriminates against employees for union-related reasons; and (2) if it does, whether such discrimination so seriously impairs rights guaranteed by the Act as to require a finding of illegality even in the absence of proof of illegal motive in maintaining or enforcing the provision. The first of these issues is considered under this point heading.

#### A. The Radio Officers' Case

In Radio Officers' Union v. N.L.R.B., 347 U.S. 17 (1954), the Supreme Court, referring to Section 8(a)(3), stated at 347 U.S. 43:

> "Nor does this section outlaw discrimination as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

The Court emphasized that proof of motive to encourage or discourage membership is essential to finding a violation.

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both §8(a)(3) and its predecessor.
>
> * * *
>
> That Congress intended the employer's purpose in discriminating to be controlling is clear." (Id. at 43-44)

In Local 357, Teamsters v. N.L.R.B., 365 U.S. 667 (1961), the Court repeated these principles and paraphrased its holding in Radio Officers' that,

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." (365 U.S. at 675)

Turning to the degree of proof required to establish motivation, the Court stated in Radio Officers' and repeated in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967),

> "... that proof of certain types of discrimination satisfies the intent requirement [footnote omitted]. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man

> is held to intend the foreseeable consequence of his conduct." (347 U.S. at 45)

The Board contends that,

> "The [stewards] provision, then, is clearly one of the types of discrimination referred to by the Supreme Court in Radio Officers' and Great Dane which inherently encourages union adherence and, as such, is unlawful regardless of either the Company's or Union's motivation in adopting it or its actual impact upon the employees." (Board's brief, p. 10).

Inasmuch as the Board has not established any unlawful motivation here, its order can be enforced only if the inherently discriminatory principle is applicable. We shall now examine the scope of the inherently discriminatory principle and those "types of discrimination" which must be proved in order to obviate "specific proof of intent."

B. The Scope of the Inherently Discriminatory Principle

The Supreme Court made it clear in Local 357, Teamsters v. N.L.R.B., supra, that Radio Officers' had not relieved the Board of the necessity of proving that union related discrimination has in fact occurred or authorized it to regulate discrimination not specifically

proscribed by the Act. The inherently discriminatory principle merely obviates proof of motivation in certain cases where it is proved that union related discrimination has in fact been practiced.

> "As we have seen, the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. * * * Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more persuasive regulatory scheme." (365 U.S. at 676 (emphasis added))

This Court has noted the Board's tendency to ignore the necessity of proving the statutory element of union related discrimination by seeking to expand the "... restricted scope of the inherently-discriminatory principle..." (N.L.R.B. v. Great Atlantic & Pacific Tea Company, 340 F.2d 690 (2d Cir. 1965)) and has stated:

> "Indeed, we reject the Board's novel and non-evidentiary mechanistic foreseeable consequences rule precisely because it has 'no place in an area of the law already overburdened with hypothetical conjectures remote from the realities of industrial existence.'" (340 F.2d at 695)

The Court reviewed the Radio Officers' decision and said:

> "But, we should note that the Radio Officers' case was limited by the Supreme Court to situations where the employer's conduct is 'inherently' discriminatory. 347 U.S. at 45, 48, 74 S.Ct. 323 [footnote omitted]. When union membership considerations form the sole basis of an employer's action against certain employees, the likelihood that protected union activities will be encouraged or discouraged is so great that improper motivation will be presumed without direct proof.
>
> The exception, however, cannot swallow the rule." (340 F.2d at 694 (emphasis added))

Similarly, this Court stated in N.L.R.B. v. Miranda Fuel Co., Inc., 326 F.2d 172, 175 (2d Cir. 1963), that,

> "On the subject of fair and impartial representation the Board insists upon the per se approach. Like all cliches and short cuts in the law, designed to make life easy for the judicial officer who has to make the decisions, this merely eliminates the thinking process necessary to get at the root of the matter."

Examination of Radio Officers' and the decisions which have followed it show that the inherently discriminatory principle was not directed to the situation in this case.

C. Types of Discrimination Covered by the Inherently Discriminatory Principle.

In Radio Officers' the Supreme Court reviewed three decisions which it referred to as Teamsters, Radio Officers and Gaynor (347 U.S. at 21-22). In Teamsters an employee's seniority standing was reduced, in the absence of a valid union security clause (347 U.S. at 42), because of his delinquency in paying union dues (347 U.S. at 25). In Radio Officers' a union member was denied employment because of his failure to secure union "clearance" although such clearance was not required by the collective bargaining agreement (347 U.S. at 28-33). In Gaynor retroactive payments, pursuant to a contract settlement, were made to employees who were union members but were refused to employees who were not members (347 U.S. at 34-36).

The Court found in each of these cases that,

> "The purposes of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership." (347 U.S. at 52)

In Teamsters the purpose was "... encouraging prompt payment of dues" (347 U.S. at 42). In Radio Officers' it was "... to coerce Fowler into following the union's

desired hiring practices..." (Ibid.). In Gaynor it was "... encouragement of union membership..." (347 U.S. at 51).

Discrimination because of union membership or adherence to union policies was clear and direct in each case. It was proved in each case that the only way an employee could secure contractual benefits was to be a union member or to adhere to union policies. There was no question that discrimination was "... in fact... used to encourage... union membership..." (Local 357, Teamsters v. N.L.R.B., supra at 365 U.S. 676) or adherence to union policies.

In the present case there is no proof, nor has there been any attempt to prove, that the stewards provision discriminates on the basis of union membership or activity. Such proof was essential in Radio Officers' for application of the inherently discriminatory principle. Similarly, in the additional cases cited by the Board findings of violations were based upon findings of discrimination dependent upon union membership, adherence to union policies or participation in union activities.

In N.L.R.B. v. Erie Resistor Corporation, 373 U.S. 221 (1963), the employer granted 20 years additional seniority during a strike to replacements for striking

employees and to strikers who agreed to return to work. This tactic broke the strike, and the union was forced to capitulate (373 U.S. at 224). The Board found that the consequence upon "the strike weapon" of this discrimination "was and would be" devastating (373 U.S. at 235). Inasmuch as the right to strike is concerted union activity which is protected by Section 7 of the Act (373 U.S. at 233) and for which Congress has shown a constant concern (373 U.S. at 234), and the discrimination was dependent upon participation in the strike, the inherently discriminatory principle was applicable.

In American Ship Building Company v. N.L.R.B., 380 U.S. 300 (1965), the Supreme Court held that an employer's lockout of employees did not, under Radio Officers', fall

> "... into that category of cases arising under Section 8(a)(3) in which the Board may truncate its inquiry into employer motivation." (380 U.S. at 312)

The Court found insufficient the

> "... arguable possibility that someone may feel himself discouraged in his union membership or discriminated against by reason of that membership...." (380 U.S. at 312-313)

The Court concluded by warning that the "deference owed" the Board "... cannot be allowed to slip into a judicial inertia..." (380 U.S. at 318).

N.L.R.B. v. Brown, 380 U.S. 280 (1965), was another lock-out case in which enforcement of a Board order was denied. Emphasizing once again the restricted scope of Radio Officers', the Court reiterated the necessity of proving union related discrimination as well as motivation.

> "Under that section [§8(a)(3)] both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required.
>
> * * *
>
> We recognize that, analogous to the determination of unfair practices under §8(a)(1), when an employer practice is so inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of §8(a)(3)." (380 U.S. at 286-287 (emphasis added)).

N.L.R.B. v. Great Dane Trailers, Inc., supra, was similar to the Erie Resistor case. The employer gave vacation pay only to strikers' replacements, non-striking employees and those who abandoned the strike. The Court stated that Section 8(a)(3)

"... requires specifically that the Board find a discrimination and a resulting discouragement of union membership." (388 U.S. at 32).

Great Dane held, as did Erie Resistor, that the Act covers discouragement of participation in the protected union activity of the legitimate strike (388 U.S. at 32), and the Court applied the inherently discriminatory principle as it had in Erie Resistor.

The Board has cited N.L.R.B. v. International Association of Machinists, Lodge 727, 279 F.2d 761 (9th Cir. 1960), cert. denied, 364 U.S. 890 (1960); N.L.R.B. v. Local 50, Bakery Workers, 339 F.2d 324 (2d Cir. 1964), cert. denied, 382 U.S. 827 (1965); and N.L.R.B. v. Local 282, Teamsters, 412 F.2d 334 (2d Cir. 1969), cert. denied, 396 U.S. 1038 (1970). In each of those cases discrimination based upon union membership, adherence to union policies, or participation in protected union activities was proved.

In Machinists employees lost seniority in the bargaining unit if they transferred to a unit represented by another union but retained seniority if they transferred to an unrepresented unit. The discrimination was found to be directed to the exercise by employees of the protected activity of seeking union representation

within their new units (279 F.2d at 764). In Bakery Workers an employee was not rehired after a strike because, contrary to union policy, he worked elsewhere and joined another union during the strike. In Teamsters an employee's seniority was taken away because he engaged in anti-union activities during a strike.

There was proof in each of the cases cited by the Board that discrimination was dependent upon union membership, adherence to union policies or participation in protected union activities. None of these factors is present in this case. Becoming a steward is not dependent upon union membership. The only condition is that the steward "... be an employee of the place in which he is Steward." (A. 31). There is no requirement that a steward adhere to union policies or that he participate in or refrain from participating in a strike or other union activity. As the Board stated,

> "If we have made an unstated assumption it is that the union will select persons for steward who have the ability to perform the job effectively." (A. 73).

The inherently discriminatory principle permits the Board to forego the necessity of proving illegal motive in certain cases. The Board attempts here to use it as a substitute for proof in the first

instance that discrimination is in fact union related. There is no basis in law for it to do so.

We turn now to court decisions involving cases similar to the present case.

D. Necessity of Proving Union Related Discrimination

In N.L.R.B. v. Local 294, Teamsters, 317 F.2d 746 (2d Cir. 1963), this Court denied enforcement of a Board order based upon findings of Section 8(b)(2) violations. The union had caused the employer to deny a driver the priority he had previously enjoyed in the assignment of trips. There was no evidence that the union was motivated by considerations of union membership or activity. The Court held that Radio Officers' was not applicable (317 F.2d at p. 750) and laid to rest the argument that discrimination in seniority or job assignments at the behest of a union is per se unlawful.

> "The union does not commit an unfair labor practice merely because it causes or attempts to cause an employer to promote or demote an employee or to discriminate for or against him. In Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), discrimination in seniority which was adopted at the behest of the union was found unexceptionable. [footnote omitted] In Aeronautical Industrial

> District Lodge 727 v. Campbell, 337 U.S. 521, 69 S.Ct. 1287, 93 L.Ed. 1513 (1949), the Court gave its approval to super-seniority for union officials which was, of course, a practice proposed by the union. Local 357, International Brotherhood of Teamsters, etc. v. N.L.R.B., 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed. 2d 11 (1961), held that it was not an unfair labor practice for a union to cause the discharge of an employee because he was hired ahead of other men to whom the union had assigned preference. See also Alvado v. General Motors Corp., 303 F.2d 718 (2d Cir.), cert. denied, 371 U.S. 925, 83 S.Ct. 293, 9 L.Ed.2d 233 (1962)." (317 F.2d at 748).

Local 357, Teamsters v. N.L.R.B., supra, involved a collective bargaining agreement which provided for a hiring hall. Under the hiring hall clause referrals were not to be based upon union membership. The union caused the employer to discharge a union member because he had obtained employment without going through the hiring hall. The Supreme Court held that Radio Officers' could not be extended to infer illegal discrimination where it was clear from the face of the contract that there was to be no discrimination on the basis of union membership, and the union merely enforced the agreement (365 U.S. at 675).

In N.L.R.B. v. News Syndicate Company, 365 U.S. 695 (1961), the Supreme Court affirmed this Court's

decision setting aside the Board's findings of Section 8(b)(2) violations based upon the hiring provisions in a collective bargaining agreement. Unlike the contract in Local 357, Teamsters, supra, the contract in News Syndicate did not expressly state that hiring would not be based on union membership. The Court found this difference to be of no consequence and said that it would

> "... not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, 'In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.'" (365 U.S. at 699-700)*

These principles are fully applicable to the present case. The stewards provision regulates seniority. That is not in itself unlawful. It was enforced to determine Rosengrandt's and Daniels' job assignments. That is not in itself unlawful (N.L.R.B. v. Local 294, Teamsters,

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*The agreement in News Syndicate incorporated union hiring rules. The Court dealt separately with this portion of the hiring provision and found it covered by a savings clause (365 U.S. at 700). The concurring Justices would have required a finding of an unfair labor practice actually arising from application of the union rules (365 U.S. at 703-704).

supra). It does not turn upon union membership or activity. There is no basis for assuming that it calls for illegal discrimination. The inherently discriminatory principle is not applicable (N.L.R.B. v. News Syndicate Company, supra). The Board has failed to establish any violation of the Act.

## POINT II

### IN ANY EVENT, THE STEWARDS PROVISION DOES NOT HAVE THE FORESEEABLE CONSEQUENCE OF ENCOURAGING OR DISCOURAGING UNION MEMBERSHIP OR ACTIVITIES.

It has been shown under the preceding point heading that this case does not meet the criteria for application of the inherently discriminatory principle. It is clear, in any event, that this case is not within the purpose of that principle.

### A. The Foreseeable Consequences Test

The inherently discriminatory principle was not intended to require conclusions contrary to logic and experience. As stated in the Radio Officers' case, it

> "... is but an application of the common law rule that a man is held to intend the foreseeable consequence of his conduct." (347 U.S. at 45)

It is not relevant to situations where the foreseeable consequence of the activity involved is beyond the scope of the Act.

The Board relies in its brief on N.L.R.B. v. Great Dane Trailers, Inc., supra, and contends that,

> "As the Great Dane case makes clear, it is the Union's burden to establish that it was in fact motivated by this alleged [valid] purpose." (Board's brief, p. 14).

The argument is without merit. The Great Dane decision did not extend the inherently discriminatory principle to situations where the foreseeable consequence of union conduct was beyond the scope of the Act. Indeed, the Court emphasized that the principle has no purpose other than to determine whether the activity complained of had a proscribed foreseeable consequence.

> "Some conduct, however, is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive. [citations omitted] That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" (388 U.S. at 33)

B. The Foreseeable Consequence of the Stewards Provision

The only foreseeable consequence of the grant of seniority to stewards is to encourage persons to serve as stewards. There is no basis for any other conclusion in this case. Comparison to N.L.R.B. v. Erie Resistor Corporation, supra, reinforces this conclusion.

Erie Resistor involved the grant of super seniority to certain employees. There was no contention and no finding that the grant of super seniority was itself violative of the Act or had the foreseeable consequence of encouraging or discouraging union membership or participation in union activities. As has been shown (page 21, supra,), it was the conditioning of super seniority upon non-participation in the protected activity of striking which was critical, and the Board was permitted the logical inference that it had the foreseeable consequence of discouraging participation in union activities.

The record in this case is devoid of any showing that the grant of stewards seniority is dependent upon anything other than service as a steward. The only permissible inference is that the foreseeable consequence of maintaining and enforcing the provision is to encourage

service as a steward. The Act is not concerned with this result, and the inherently discriminatory principle is not involved.

C. No Protected Rights Affected

The Board has failed to show that any union related motivation is involved here. The inherently discriminatory principle cannot overcome this deficiency. The most that is involved is the assignment of seniority ranking and of jobs pursuant to a collective bargaining agreement. Any contention that this is in itself unlawful would be without merit (N.L.R.B. v. Local 294, Teamsters, supra; see, pages 25-26, supra). The authorities show that the opposite is true. There is no inherent or statutory right to seniority or to job assignments.

Seniority arises from contract or statute. Ford Motor Company v. Huffman, 345 U.S. 330 (1953); Aeronautical Industrial Dist. Lodge 727 v. Campbell, 337 U.S. 521, 526 (1949); Central States Petroleum Union, Local 115, 127 NLRB 223, 226-227 (1960). The Act is not concerned with seniority ranking (N.L.R.B. v. Local 294, Teamsters, supra at 317 F.2d 748). It does not mandate longevity of employment as the sole criterion of seniority (Ford Motor Company v. Huffman, supra at 345 U.S. 338, 342). The Supreme Court and the Board have

approved super-seniority for stewards for purposes of lay-off and recall (Aeronautical Industrial Dist. Lodge 727 v. Campbell, supra; A. 74, fn. 6). The Court of Appeals for the Third Circuit has approved super-seniority for stewards for purposes of job preference (Koury v. Elastic Stop Nut Corporation, 162 F.2d 544 (3d Cir. 1947); DiMaggio v. Elastic Stop Nut Corporation, 162 F.2d 546 (3d Cir. 1947); Board's brief, p. 17). Similarly, there is no right, inherent or under the Act, to job assignments (N.L.R.B. v. Local 294, Teamsters, supra). This case involves only the lawful enforcement of a lawful contract.

## POINT III

## MAINTENANCE AND ENFORCEMENT OF THE STEWARDS PROVISION IS JUSTIFIED

Even if maintenance and enforcement of the stewards provision could be found in the first instance to discriminate against employees because of union related activities, such discrimination would be justified.

The Board did not "suggest" that Local 338 appoints stewards without regard to capability (A. 72). It assumed that stewards were appointed because of their "... ability to perform the job effectively" (A. 73). It conceded that "... stewards serve a useful purpose..." (A. 76). It recognized,

> "... that the inconvenience and other disadvantages of being a steward may very well in some situations discourage employees from accepting the position, making it more difficult for a union to carry out its collective bargaining responsibilities" (A. 76).

It is undisputed that the stewards provision was approved by the persons affected by it and that not one of them ever requested that it be deleted or modified even though they could have done so (page 12, supra).

The Board, nevertheless, found that Local 338 violated Section 8(b)(1)(A) and (2) because it failed to carry the burden of establishing justification. This conclusion is illogical. Nothing would be gained by producing further evidence of what is conceded, and the Great Dane case does not, as the Board's brief would have us believe, require such a senseless exercise.

In Ashley, Hickham--Uhr Co., 210 NLRB No. 1 (1974), a union was charged with violating Section 8(b)(1)(A) and (2) of the Act by demanding that an employer hire a steward, even though it may have foreseen that this would cause the displacement of another employee (slip opinion, p. 5). The parties stipulated that this was done out of a valid concern to place an experienced steward on a potentially troublesome job site (Id. at p. 4). This was justification sufficient for the Board,

and the complaint was dismissed.

A stipulation in the present case that stewards serve a useful purpose, that the inconvenience of serving as steward may discouarge persons from doing so and make it more difficult for the union to carry out its responsibilities, that the employees affected have voted to give stewards benefits by reason of their serving as stewards, and that stewards are selected because of their ability to perform the job effectively would add nothing which is not already conceded. Yet it is the illusory distinction between stipulated justifications and conceded justifications which, in the Board's view, determines the legality of granting employment preferences to stewards. This approach cannot obscure the fact that employment benefits for stewards are justified by reason of their service as stewards to all members of the bargaining unit.

## CONCLUSION

THE BOARD'S APPLICATION SHOULD
BE DENIED IN ALL RESPECTS.

Respectfully submitted,
COHEN, WEISS and SIMON,
Attorneys for Respondent

Of Counsel:
Stanley M. Berman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket
~~Index~~ No. 75-4218

NATIONAL LABOR RELATIONS BOARD,

Petitioner ~~xxxxx~~

*against*

MILK DRIVERS & DAIRY EMPLOYEES, LOCAL 338, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Respondent ~~xxxxxxx~~

*AFFIDAVIT OF SERVICE BY MAIL*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*The undersigned being duly sworn, deposes and says:*

*Deponent is not a party to the action, is over 18 years of age and resides at* 750 East 236 Street
Bronx, New York 10466

*That on the* 20th *day of* January *1976 deponent served the annexed*
two copies of the annexed brief

*on* Elliott Moore, Esq., Deputy Associate General Counsel
*attorney(s) for* Petitioner
*in this action at* 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570
*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in —~~a post office~~— official depository under the exclusive care and custody of the United States post office department within the State of New York.*

*Sworn to before me*
*this* 20th *day of* January *1976.*

Donna Schlaghaufer
*The name signed must be printed beneath*
Donna Schlaghaufer

Stanley M. Berman
STANLEY M. BERMAN
Notary Public, State of New York
No. 60 5291750
Qualified in Westchester County
Commission Expires March 30, 1976

C 321—Affirmation of Service by Mail.
Affidavit of Service by Mail on Reverse Side.



Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this day of 19

The name signed must be printed beneath

Attorney at Law